

## The Centrality of Habeas Corpus to Liberty

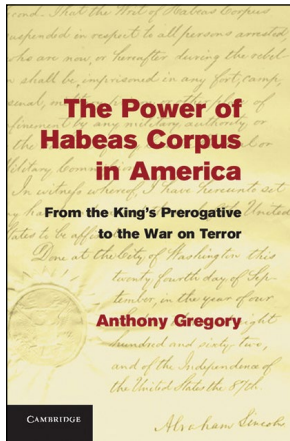
By Anthony Gregory



**H**ABEAS CORPUS TESTIFIES TO the moral principle at the center of civilization. The Great Writ, as Americans celebrate it, guarantees our freedom from arbitrary and unlawful imprisonment. Jailing the innocent typifies despotism. When the state may detain people freely, nothing resembling a free society remains. Most people in our world understand this on some level, reminding us of the moral integrity that still penetrates much of our culture.

Barack Obama, as he ran for the presidency seven years ago, stood in the Senate and hailed the “great writ” as a key feature of “the Anglo-American legal system going back 700 years.” To abuse habeas corpus would undermine “our way of life.” Suspects deserve a chance, he declared, “even one chance, to challenge the terms of their detention in court, to have a judge confirm that the government has detained the right person for the right suspicions.”

**Anthony Gregory** is Research Fellow, Director of Student Programs, and author of the new Institute book *The Power of Habeas Corpus in America*.



Yet, of course, injustice persists. Despite Obama’s promises, dozens cleared for release have languished for years at Guantánamo Bay. All manner of unjust imprisonments continue, not only in Obama’s war on terror, but throughout the bloated criminal justice system. How did this happen?

Centuries ago, American colonists demanded habeas corpus along with other rights. They did not settle for the limitations the British Crown sought to place on them. Like the English Puritans, the early Americans insisted upon the *principle* of justice, while the forces of unlimited political power sought to offer nothing but a paper promise.

Sadly, for all its history, habeas corpus never fully triumphed over tyranny. Royal courts developed the writ in part to extract revenue. The king circumvented the courts in the name of empire. Many American presidents have followed suit.

The Supreme Court and Congress have had their hand in the ruin. Habeas corpus has become nationalized, statutorily limited, and judicially minimized. Most of America’s millions of prisoners have no access to its protection. This reality would horrify the writ’s medieval advocates.

In researching for my new Independent Institute book *The Power of Habeas Corpus in America* (Cambridge University Press, 2013), I learned a lot about the dark side of habeas—its limits, its weaknesses, its long history tainted by opportunistic judges and political betrayal. Judges have used the writ to enforce slavery and centralize power. Its circumstantial champions will often turn around and betray habeas out of political expediency. Obama is not the first to do so. Parliamentarians in England, Thomas Jefferson, and Reconstruction-era Congressmen all foreshadowed his hypocrisy.

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## President's Letter

### Let's Shrink Government Power

AS THE AVERAGE AMERICAN begins shouldering the cost of Obamacare, discontent against out-of-control government power is building. Such issues now present a real opportunity to harness this discontent and mobilize alternative, market-based solutions to provide affordable and accessible healthcare without Obamacare; shrink government power; reverse out-of-control spending; and more!



- The **Healthcare Contract with America**, based on our award-winning book by Senior Fellow John Goodman, *Priceless: Curing the Healthcare Crisis*, lays out a 5-point plan that has been presented at congressional meetings and is informing millions of the alternatives to Obamacare.
- Our **Calculator** at MyGovCost.org provides a powerful, personalized picture of runaway government spending and has inspired over ten million people to learn more about government spending and what can be done!
- **370,000 Facebook followers** read and share our daily postings—inspiring **4.5 million monthly** through social networking with our new *Independent Watch* internet videos providing an inspiring call to action that goes viral across social networks.
- **With an annual reach of 6.4 billion impressions** across TV/radio, internet, and print circulations, our innovative solutions are featured at such media as the *Wall Street Journal*, *Los Angeles Times*, *The Hill*, ABC, Fox, and CNN.
- Our **34 regional and national events** have engaged audiences from students to top DC policymakers. And, we have expanded our **Challenge of Liberty Summer Seminars** to include more weeklong programs for college students.
- Our books, including *Aquanomics*, *Boom and Bust Banking*, and *Priceless* form the basis for policymaker briefings at the national and state levels, as well as before the U.S. Supreme Court.

Please join with us to accelerate this work by becoming an **Independent Associate Member**. With your tax-deductible membership, you can receive a **FREE** copy of *The Power of Habeas Corpus in America* (p.1), *The Terrible 10* (p.5), *Global Crossings* (p. 6), *Priceless*, and other publications, including our quarterly journal, *The Independent Review* (p. 3), plus other benefits (please see attached envelope).

David J. Theroux

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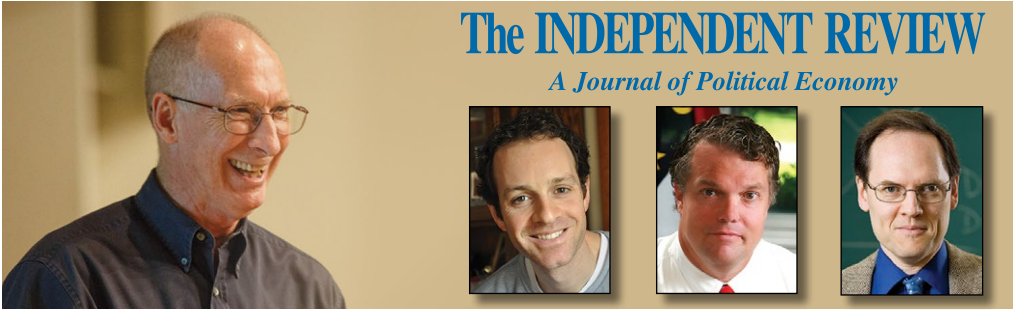
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## The Independent Review

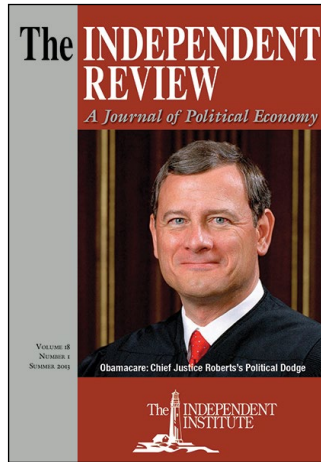
# The Independent Review Has New Editorial Team!



Left to right: Robert Higgs, Founding Editor and Editor at Large; Co-Editors Christopher J. Coyne, Michael C. Munger and Robert M. Whaples

**A**FTER 17 YEARS, Senior Fellow and Founding Editor **Robert Higgs**, whose keen judgment and impressive erudition have made our quarterly journal one of the best of its kind, has handed over the day-to-day reins to three excellent scholars: **Christopher J. Coyne** (George Mason University), **Michael C. Munger** (Duke University), and **Robert M. Whaples** (Wake Forest University), who also serves as Managing Editor.

In so doing, Dr. Higgs has become Editor at Large, writing his popular “Etceteras . . .” column in every issue—and we’re confident that the new co-editors will maintain the high standards he has set. Here are two highlights from their inaugural issue, the Summer 2013 edition:



The Independent Review, Summer 2013

### Obamacare and the Roberts Opinion

Last year, Supreme Court Chief Justice John Roberts surprised almost everyone by casting the swing vote to uphold the individual mandate provision of the Affordable Care Act. The mandate is constitutional, he argued, not because Congress can regulate interstate commerce (a rationale he rejected), but because the law’s “penalty” for noncompliance is a tax even though its creators never called it a tax.

A legal finding that the penalty is a tax could have resulted in a major setback for Obamacare’s opponents. That’s because an obscure law called the Anti-Injunction Act stipulates that a federal tax cannot be challenged in court before the revenues are collected.

Roberts, however, argued that for the purposes of the Anti-Injunction Act the penalty *is not* a tax although for the purposes of determining the mandate’s constitutionality it *is* a tax! This strategy enabled him

to promote what was reportedly his overarching goal: to restore the Court’s “bipartisan legitimacy.”

Some conservative pundits praised the Roberts decision for preventing the legislature from regulating inactivity via the U.S. Constitution’s Commerce Clause. Healthcare lawyer and policy analyst **John S. Hoff** believes this view is naïve.

“Roberts’s opinion gives Congress a powerful new tool for using taxes as an instrument of social regulation,” he writes in the lead article. “Congress merely has to impose a ‘tax’ on the failure to take an action.”

See “Obamacare: Chief Justice Roberts’s Political Dodge,” by John S. Hoff, at: <http://www.independent.org/publications/tir/article.asp?a=939> •

### Jim Crow and the Progressives

Historians often write glowingly about the Progressive movement of the late 19th and early 20th centuries. Typically they write off the racist statements made by many of its leaders—Herbert Croly, John Dewey, Teddy Roosevelt, Woodrow Wilson, and others—as minor “blind spots” unrelated to Progressivism. But perhaps the apologist historians also have trouble seeing clearly.

According to Frostburg State University economists **William L. Anderson** and **David Kiriazis**, the Progressive economic “reforms” often enabled statutes aimed at restricting opportunities for African Americans.

“These two sets of laws complemented each other as the regulatory regimes created economic rents that whites could exploit, and Jim Crow laws helped ensure that whites would not have as much competi-

(continued on page 7)

## The Independent Institute in the News

### Center on Health and Environment

Senior Fellow John C. Goodman in the *Wall Street Journal*, 5/20/13

“Navigating the Obamacare Maze”

One of the worst mistakes the federal government makes is the tendency to try to reinvent systems the private sector has already invented. The government has been true to form under the health-reform law, completely ignoring private exchanges that are up and running.

[www.independent.org/newsroom/article.asp?id=3620](http://www.independent.org/newsroom/article.asp?id=3620) •



Senior Fellow **John C. Goodman** speaking at an Independent Institute event.

### Center on Culture and Civil Society

Research Fellow Jonathan Bean in *USA Today*, 5/15/13

“Ending Racial Hatred with Heart, Wallet”

Our cynical age thinks that religious motives are “cheesy,” as one reviewer put it, and that capitalism is evil. But (Branch) Rickey and (Jackie) Robinson—devout Methodists both—didn’t think so. They believed that people should be judged on their merits, as God intended, not by the color of their skin. They also believed that capitalism, not government, held the key to equal opportunity. And together they practiced what they preached.

[www.independent.org/newsroom/article.asp?id=3619](http://www.independent.org/newsroom/article.asp?id=3619) •

### Center on Peace and Liberty

Senior Fellow Ivan Eland on *Breitbart.com*, 3/14/13

“CPAC Interview: Ivan Eland Talks *Recarving Rushmore*”

World War I was the single most important event of the 20th Century. . . . Woodrow Wilson is



Senior Fellow **Ivan Eland** on *Breitbart.com*.

responsible for big government in the U.S., not FDR, because during the New Deal they brought all those agencies and individuals and programs back because Wilson had set this enormously bad precedent of taking over the entire economy to fight the war. Even Lincoln didn’t do that in the Civil War.

[www.independent.org/multimedia/detail.asp?m=338](http://www.independent.org/multimedia/detail.asp?m=338) •

### Center on Entrepreneurial Innovation

Senior Fellow William F. Shughart II in *Investor’s Business Daily*, 5/26/13

“IRS Scandal Is Nothing New—It’s Always Been a Political Weapon”

No one other than the most naïve observer of American politics should be shocked to find that the IRS, like all bureaucracies, is susceptible to political manipulation. It’s happened before and will probably happen again.

[www.independent.org/newsroom/article.asp?id=3626](http://www.independent.org/newsroom/article.asp?id=3626) •

Senior Fellow **Benjamin Powell** in *Forbes*, 5/2/13

“Sweatshops in Bangladesh Improve the Lives of Their Workers, and Boost Growth”

If U.S. businesses reduce their activity in Bangladesh because of accidents like this, it will only slow the very development process that ultimately is the key to achieving safety improvements. Consumers who truly care about the welfare of Bangladeshi workers should encourage companies to source garments from the country, rather than abandon its factories.

[www.independent.org/newsroom/article.asp?id=3611](http://www.independent.org/newsroom/article.asp?id=3611) •

## New Book

## 100 Years of Economic Blunders

THE U.S. ECONOMY'S IMPRESSIVE gains during the past century cannot be fully appreciated without some understanding of the setbacks created by our political leaders' policy failures—blunders that created mass unemployment and hampered economic progress.

*The Terrible 10: A Century of Economic Folly*, by University of Delaware economics professor and MyGovCost.org Director **Burton A. Abrams**, tells the story of these government-made setbacks.

What was the worst policy mistake of the past 100 years? The biggest economic blunder was the Federal Reserve's handling of the Great Depression. Even if the Fed were responsible for only a modest portion of the crisis—say, the part of the unemployment rate *above* 10 percent from 1931 to 1935—it would deserve blame for a gargantuan loss in production and income totaling \$15.5 trillion over five years.

Prohibition also ranks among the worst mistakes of the past 100 years. Ratified in 1919, the 18th Amendment encroached on personal liberties, severely strained the criminal justice system, interfered with local government finances, rewarded violent criminals, corrupted public officials, and encouraged otherwise law-abiding citizens to break the law. Unfortunately, policymakers haven't learned the lesson: The War on Drugs has had similar effects.

Some readers may be surprised to see Social Security and Medicare listed among the "terrible ten." After all, although these programs are headed toward major funding shortfalls, they haven't caused huge problems yet, right? Wrong. America's biggest entitlement programs, Abrams explains, have long been huge disasters for economic growth: By weakening people's incentives to save, they have reduced the funds available for private investment and wealth creation.

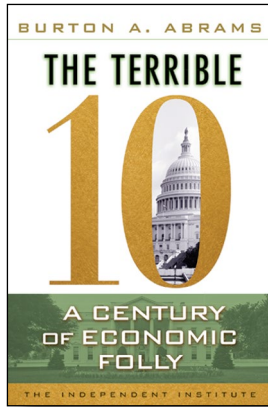
Abrams provides scores of fascinating details about the nation's economic policy disasters. The worst trade bill in U.S. history, the Hawley-Smoot Act, imposed an average tariff rate of *53 percent*. It intensified the Great Depression and sparked a trade war that helped set the stage for World War II.

The 16th Amendment made the federal income tax a permanent fixture. Tax-preparation instructions have grown from one page in 1913 to 7,000 pages today. The income tax hides over a trillion dollars in hidden subsidies that distort economic decision-making and waste labor, capital, and other resources. Those subsidies also make it politically difficult to simplify the tax code and reduce the tax burden.

The inflation of the 1970s was another policy disaster manufactured in Washington, DC. Nixon's Oval Office tape recordings reveal that the president pressured Fed Chairman Arthur Burns to pump up the money supply prior to the 1972 election. The ensuing inflation took three recessions to extinguish.

*The Terrible 10* also illuminates horrendous environmental mismanagement, the Great Recession, and decades of federal deficits.

"It was difficult to winnow the list of bad policies down to the ten worst," Abrams writes.



### Praise for *The Terrible 10*

"A must-read for muddled millennials, Senators, teachers, Federal Reserve governors, and all lovers of liberal follies and conservative crony capitalism."

— **George Gilder**, author of *Wealth and Poverty*, *Telecosm*, and other books

"*The Terrible 10* is a book that's both delightful and therapeutic. In wry and stylish prose Abrams describes all the symptoms of what happens when the disease of government infects the body of the marketplace."

— **P. J. O'Rourke**, author of *Parliament of Whores*, *Eat the Rich*, and other books

"A delight to read, *The Terrible 10* clearly and superbly discusses in detail the ten worst government disasters of the past ten decades."

— **James D. Gwartney**, Professor of Economics, Florida State University

## Feature

Senior Fellow Alvaro Vargas Llosa on *WSJ* Opinion Live

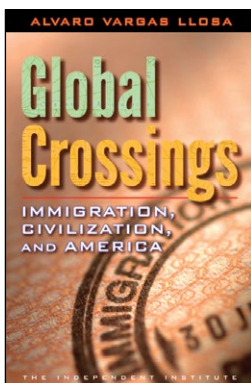
**T**HE RECENT REAWAKENING of the debate surrounding immigration has evoked intense emotion, particularly in the United States. What is the solution for those who want a stable economy, grounded in policy that respects those pursuing the American dream?

Summarized below, Senior Fellow and author of *Global Crossings: Immigration, Civilization, and America* Alvaro Vargas Llosa answers in his June interview with *Wall Street Journal* Opinion Live:

**WSJ:** “Some Republicans are citing a Heritage Foundation study that says the costs of such [immigration] reform are too high. Is there anything to suggest that immigrants are less economically productive—a drain on America essentially—than citizens are?”

**Vargas Llosa:** “No, what they do with immigration is what the left usually does with tax cuts. They only take into account what they can see immediately, but not what they can’t see, and what they can’t see is much more important in this case because you’re talking about the contribution to the economy.

**WSJ:** “Could this die in the House?”



**Vargas Llosa:** “It won’t die. My worry is that they’ll just amend it in such a way that it will be meaningless.”

**WSJ:** “What if we just got a guest worker program. Is that a step forward?”

**Vargas Llosa:** “Unless you do comprehensive reform you will have no reform at all. The important thing here is to understand that there are lessons from the past. There was reform in 1965, ‘86, even ‘96, and the lesson was: don’t take care just of the immediate problem, take care of what will happen next.

So, if you do a program for workers, or you do amnesty, or whatever you want to call it, and you legalize those who are in the shadows now but you don’t create a flexible and open system, you’re going to end up somewhere down the line with another 11.5 million illegals.”

**WSJ:** “[And] with the same problem we’re trying to solve today. Independent Institute Senior Fellow Alvaro Vargas Llosa, thank you so much for being on the show.”

To learn more about *Global Crossings: Immigration, Civilization, and America* or to order online, please visit [www.independent.org/GlobalCrossings](http://www.independent.org/GlobalCrossings).

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## Anthony Gregory: The Centrality of Habeas Corpus to Liberty

(continued from page 1)

I wanted to find the silver-bullet legal argument for why everything Bush and Obama have done failed the tests of precedent. Unfortunately, I could not, because an awful lot of bad precedent exists for what they have done. Where the state acts immorally, it does not always act illegally. In the cause of liberty, we face temptations to take the easy way, to make a disingenuous argument, to oversimplify history, and to make the case simple. The enemies of liberty do this all the time, but it is no excuse for us to do so.

Sometimes the truth is hard to face. Sometimes even our beloved institutions let us down. In our own time, as in all the habeas battles in history, we can easily find injustice if we search.

Seeking out principle, as well as truth, is tireless work. It takes time and patience. We strive to defend

that principle even when surrounded by the hostile advocates of unchecked state power. They have all the resources. But we have the truth, and we offer the unparalleled prospect of human liberation.

Chief Justice Holmes said habeas corpus goes to the “tissue of the structure” of the legal system, and warned against it becoming an “empty shell.” But even as the legal remedy has suffered, the principle we associate with it sings loudly the songs of justice. Even when the writ fails in the courtroom, the ideas it embodies live on.

We are tireless in our dedication to individual rights, despite what seem like bad odds. It was the same for those who took on the king. We owe our liberties to their struggle. We owe it to their memory and to the future to continue that struggle and never relent. •

## The Independent Review: The Independent Review Has New Editorial Team!

(continued from page 3)

tion for those rents,” Anderson and Kiriazis write.

One especially pernicious example involves medical licensing. In 1910, the nation had seven African American medical schools. But after Progressive reformers pushed for standards favored by the (whites-only) American Medical Association only two remained. The school closures led to fewer black doctors available to serve their communities and higher incomes for white doctors.

“From attempts to block out migration of labor to laws favoring labor unions, and from professional licensing to the Davis-Bacon Act and minimum-wage laws, Progressives enacted rules and legislation that paralleled Jim Crow laws in their effects,” Anderson and Kiriazis write.



Drinking fountains during Jim Crow law enforcement in Oklahoma City, Oklahoma. Photo credit: Wikimedia Commons.

See “Rents and Race: Legacies of Progressive Policies,” by William L. Anderson and David Kiriazis, at [www.independent.org/publications/tir/article.asp?a=947](http://www.independent.org/publications/tir/article.asp?a=947). •

## New Book: The Terrible 10

(continued from page 5)

“Some economists may feel some great candidates were overlooked or the rankings were out of order. Most, however, would agree that the ten selected here were poorly designed and needlessly wasteful.”

Abrams takes care to assign blame where it is due. “Bad economic policies are not the monopoly of any one political party,” he continues. “The blunders divide fairly equally among Democrats and Republicans. . . . Basic forces work to encourage the production of wasteful economic policies, regardless of the political party in power.”

Those “basic forces,” Abrams explains, include interest-group pressures, government paternalism, a short-term focus (what he calls *immediosis*), and the choice to stay ignorant about the harmful effects of government policies. Unless we address those factors, policymakers are bound to repeat their mistakes—and with disastrous consequences for the rest of us.

To order *The Terrible 10*, by Burton A. Abrams, visit: [www.independent.org/store/book.asp?id=105](http://www.independent.org/store/book.asp?id=105) •

## It's Now or Never for Liberty

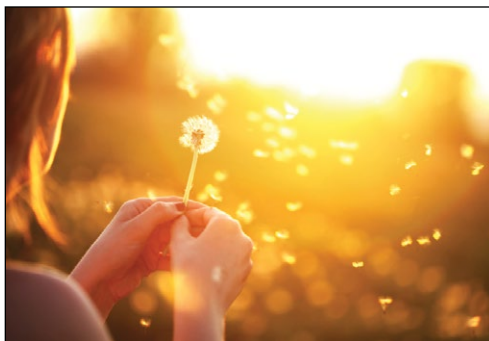


photo: istockphoto.com

**W**HEN THE INDEPENDENT INSTITUTE was founded in 1986, many people questioned the need for a scholarly think tank dedicated to promoting individual rights and civil liberties. But as recent news stories show, the case for liberty must be loudly made each day by those who remain true to the core values of a free society.

Today Americans face a variety of critical issues, including a loss of privacy of their communications, runaway government spending and debt, a bureaucratic healthcare system falling more deeply into crisis, and the need for equitable immigration

policies to fuel a healthy economy. Yet, on the positive side, The Independent Institute is far from letting these issues hamper your individual liberty!

Our work is seeding real-world, market-based alternatives among top media, business, government, and academic leaders and includes:


- Extensive media coverage from all sides of the political spectrum
- Testimony to policymakers and arguments before the Supreme Court
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As we continue our work developing ethical, innovative solutions for societal challenges, won't you please join with us? Your tax-deductible donation will help us end our fiscal year strong, while we deploy it in exciting initiatives for students, policymakers, and influence leaders across every sector.

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